Office - Supreme Court, U.S.
FILED
JUL 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 812387

IN THE

Supreme Court of the United States

October Term, 1981

RESTAURANT EMPLOYEES, BARTENDERS AND HOTEL SERVICE EMPLOYEES WELFARE AND PENSION TRUST
and
HOTEL, MOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS UNION LOCAL 8,
Petitioners

v.

GATEWAY CAFE, INC.,
KYLE CLEVEN, V.S. LARSON,
BYPASS SALES, INC.,
Respondents

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Richard P. Donaldson
Duane D. Kiel
DONALDSON & KIEL, P.S.
and Sanford Levy on Brief
Counsel for Amici Curiae

2819 First Avenue
Seattle, Washington 98121
(206) 682-5261

PARTIES TO PROCEEDING

Restaurant Employees, Bartenders and Hotel Service Employees Welfare and Pension Trust, successor in interest to Culinary Workers and Bartenders Union No. 596 Health and Welfare Trust

Hotel, Motel, and Restaurant Employees and Bartenders Union Local 8, successor in interest to Culinary Workers and Bartenders Union Local No. 596,

Petitioners

Gateway Cafe, Inc.

Kyle Cleven

V.W. Larson

Bypass Sales, Inc.

Respondents

Page

TABLE OF CONTENTS

Statement of Interest of Amici Curiae 2

ARGUMENT

I. Section 302(c)(5)(B) of the Labor-Management Relations Act Does Not Restrict the Payment of Fringe Benefit Contributions to Collective Bargaining Agreements with Exclusive Bargaining Representatives 3

A. The "Collective Bargaining Agreement" Requirement 4

B. The "Representative" Requirement 7

C. Considerations of Congressional Intent ... 8

II. *Gateway II* Clearly Conflicts with the Leading Case of This Court Which Holds that Trust Funds are Immune From Defenses Relating to Contract Formation 11

A. Claims for Contributions Based on Work Performed are Insulated From Employer Defenses 12

B. Minority Union Defenses Have Been Rejected 13

III. The Court's Ruling Violates Federal Labor Policy Embodied in the Labor Management Relations Act and The Employee Retirement Income Security Act 14

A. The Court's Ruling Conflicts With National Labor Policy Embodied in The Labor Management Relations Act 14

Page

B. The Court's Ruling Conflicts With National Policy Embodied in The Employee Retirement Income Security Act 16

Summary of Argument 19

Conclusion 20

TABLE OF AUTHORITY

Central States Pension Fund v. Hitchings Trucking, 102 LRRM 2139 (E.D. Mich. 1979) 18

Dohrer v. Wakeman, 14 Wn. App. 157, 539 P.2d 91 (1975) 6

Doyle v. Shortman, 311 F. Supp. 197 (S.D.N.Y. 1970) . . . 5

Hinson v. NLRB, 428 F.2d 133 (8th Cir. 1979) 4

Huge v. Long's Hauling Co., 442 F. Supp. 1041, 101 LRRM 2394 (D.C.W.D. Pa. 1977), 590 F.2d 457, 101 LRRM 2396 (3rd Cir. 1978); *cert. den.* 101 LRRM 2428 (1979) 15

Lewis v. Benedict Coal Co., 361 U.S. 459, 45 LRRM 2719 (1960) 12, 14

Lewis v. Millridge Coal Co., 188 F.Supp. 4 (E.D.Ky. 1960), aff'd 298 F.2d 552 (6th Cir. 1962) 14

Lewis v. Seanor Coal Co., 256 F.Supp. 456 (W.D.Pa. 1966), aff'd 382 F.2d 437 (3rd Cir. 1967), *cert. den.* 390 U.S. 947 (1968) 5, 13

Lewis v. Splashdam Co, 233 F.Supp. 47, 57 LRRM 2630 W.D.Va. 1964) 14

Page

Moglia v. Geoghegan, 267 F.Supp. 641 (S.D.N.Y. 1967), 403 F.2d 110 (2d Cir. 1968) *cert. denied* 394 U.S. 919 (1969) 5

NLRB v. Amax Coal Co., 101 S.Ct. 2789 (1981) 13

Pipe Trades v. England, 69 LRRM 2370 (Cal. Super. Ct. 1968) 14

Rockey v. Teamsters Pension Trust, 23 Wn.App. 248, 595 P.2d 557 (1979) 6

Shapiro v. Rosenbaum, 171 F.Supp. 875 (S.D.N.Y. 1959) . 7

Sheriff v. Medel Electric Co., 103 LRRM 2775 (D.C. Cir. 1980) 14

Suro v. Arroyo Lighterage & Shipping Co., 1 NBPC 203 (P.R. 1957) 6

Trust Fund Serivces v. Heyman, 15 Wn.App. 452 (1976), aff'd 88 Wn.2d 698 (1977), *cert. den.* 434 U.S. 987 (1977) 5, 12, 13, 14

Western Washington Cement Masons Trust v. Hillis Homes, Inc., 26 Wn.App. 244, *pet. reh. den.* #47200-0 (1980) 5, 11

TABLE OF STATUTES

Employee Retirement Income Security Act (ERISA)
29 U.S.C. 1001, et. seq. 2, 8, 16, 17
Sections 202-204, 29 U.S.C. 1052-1054 17
29 U.S.C. 1104-1113 11

Labor Management Relations Act (Taft-Hartley)
Section 8, 29 U.S.C. 158 13
Section 9, 29 U.S.C. 159 et seq. 7
Section 302(c)(5)(B), 29 U.S.C. 186(c)(5)(B) . . . 2, 3, 4, 6, 7, 8, 20, 11

Multiemployer Pension Plan Amendments Act of 1980
Section 306 ..... 8, 11

Page

MISCELLANEOUS AUTHORITIES

126 Cong. Rec. S. 11673 (daily ed. August 26, 1980) 10

126 Cong. Rec. H 7899 (daily ed. August 26, 1980) 10

29 C.F.R. §2530.200 B-(2) (a) (1) (1979) 17

Labor Department Advisory Opinion Letter on Delinquent Contributions dated August 31, 1976, Opinion 76-89, 221 BNA Pension Reporter R-24 18

IN THE

Supreme Court of the United States

October Term, 1981

RESTAURANT EMPLOYEES, BARTENDERS AND
HOTEL SERVICE EMPLOYEES
WELFARE AND PENSION TRUST
and
HOTEL, MOTEL AND RESTAURANT EMPLOYEES
AND BARTENDERS UNION LOCAL 8,
Petitioners

v.

GATEWAY CAFE, INC.,
KYLE CLEVEN, V.S. LARSON,
BYPASS SALES, INC.,
Respondents

STATEMENT OF INTEREST OF AMICI CURIAE

The Northwest I.A.M. Benefit Trust, Retail Clerks Trust of Spokane, Employees Dental Trust, Tacoma Marine Machinists Health & Welfare Trust, Tacoma Automotive Machinists Health & Welfare Trust, Lumber & Sawmill Workers Security Fund, Retail Clerks Pension & Welfare Trusts, Washington Office Employees Security Fund, and Allied Metal Crafts Pension Trust, (hereinafter referred to as the Trust Funds), were created pursuant to Section 302(c)(5)(B) of the Labor Management Relations Act 29 U.S.C. §186(c)(5)(B), (hereinafter the "Act"), and are governed by the Employee Retirement Income Security Act, 29 U.S.C. 1001, et seq., as amended, (hereinafter "ERISA"). The Trust Funds provide valuable pension and medical benefits to tens of thousands of employees who rely on the promise of those benefits in planning their family retirement and health needs. These Trust Funds are representative of thousands of private pension and health plans nationwide covering millions of employees and involving many billions of dollars.

The publication of the decision in this case has caused a massive disruption in the orderly system for the collection of employee benefit contributions. In essence the case holds that fringe benefit contributions are illegal under Section 302 of the Act unless made pursuant to a collective bargaining agreement with a union which is the exclusive bargaining representative of a participating employer's employees. The ruling will allow employers who have signed labor agreements and obtained the benefits thereof, including labor peace, to ignore the benefit obligations which they have created simply by claiming that a union never achieved majority status among its employees. Thus, even those employers who voluntarily sought a relationship with the union will be able to drop it at any time. This will render these agreements functionally meaningless within the context of protection of employee fringe benefits and the preservation of pension and welfare plan actuarial solvency.

Employee benefit plans cannot operate on hollow and unenforceable promises. Employer contributions are a plan's life blood. A financially sound plan requires a proper actuarial relationship between employer contributions and employee

benefits. Benefits are related to the amount of contributions, which in turn, are directly related to the amount of work performed under the contract. A plan can only safely project a certain benefit if it can reasonably anticipate that contributions will be forthcoming to fund the projected benefit. If there is no assurance that employers will contribute in accordance with their signed agreements, and if in fact employers can ignore their fringe benefit promises at will, the benefit promises of multi-employer plans will have become illusory.

To understand the devastating effect on employees one has to understand the way the Trusts work. They distribute plan booklets to all covered employees describing the relevant benefits to which they may be entitled, be they pension or welfare. The employees then rely on the expectations produced by their employment. Very often delinquencies and other contract breaches are reported to the Trusts by employees, who, having relied on the promise of benefits, have had medical treatment which the Trust has refused to pay after discovering that the employer has failed to pay that employee's contributions. The employee cannot and should not have to monitor the contract to determine that the union has achieved majority status. Yet, *Gateway II* would penalize him for not doing so by denying him the expected benefits.

Numerous employers participating in the Trust Funds have begun to resist their fringe benefit obligations, citing *Gateway II* as authority. By doing so they threaten the financial and actuarial soundness of the plans by invalidating all assumptions as to number of employees reportable and total contributions payable each month. Furthermore, the Trust Funds are now unable to accept employer contributions without fear of violating Section 302. All money collected, totaling millions of dollars each day will have to be held in suspense accounts until the administrator determines that at some point in the past the union attained a majority support.

ARGUMENT

I. Section 302(c)(5)(B) of the Labor-Management Relations Act Does Not Restrict the Payment of Fringe Benefit Contributions to Collective Bargaining Agreements with Exclusive Bargaining Representatives.

Section 302(c)(5)(B) of the Labor-Management Relations Act (hereafter "Act"), 29 U.S.C. 186(c)(5)(B), provides as follows:

> "(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents . . . *Provided*, that the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund . . . ."

The *Gateway II* opinion holds that an employer's payment of fringe benefit contributions is illegal under ths statute unless the union with which it has entered into a contractual relationship is the exclusive bargaining representative of the employees in the unit defined by the agreement. The Court states that:

> "For contributions to be lawful, the must be made pursuant to a *collective bargaining agreement* with a union which is a 'representative' of the employees. Under the Labor Management Relations Act, 'representative' means "*Representatives designated or selected for the purposes of collective bargaining* by the majority of the employees . . ." (at page 6) (Emphasis added.)

A. *The "Collective Bargaining Agreement" Requirement*

It is erroneous to assert that contributions may be legitimately made only pursuant to "collective bargaining agreements". Section 302 provides for the payment of contributions pursuant to "written agreements". Our courts have traditionally recognized that payments into jointly-trusteed funds may be lawful in the absence of a collective bargaining agreement. As stated in *Hinson v. NLRB*, 428 F.2d 133 (8th Cir. 1970):

> "The reference in §302(c)(5)(b) to a 'written agreement with the employer' does not comprehend solely a collective bargaining agreement to the exclusion of any other possible written agreement. A trust fund agreement separ-

ate and apart from the collective bargaining agreement would surely satisfy the statutory prerequisite." (at p. 139)

Upon this basis, the Court sanctioned payments *after* the expiration of the agreement and during the period of negotiations for a new agreement.

In *Doyle v. Shortman*, 311 F.Supp. 197 (S.D.N.Y. 1970), the Court noted that:

> "[A]n extensive search of the legislative history has yielded not a single suggestion that the phrase 'written agreement' as used in Section 302(c)(5)(B) was intended to mean a collective bargaining agreement to the exclusion of all other writings; nor is there any indication that only employers with collective bargaining relations with the union were to be deemed proper parties to Section 302 trust fund."

In conformity with these precepts, trust fund claims for unpaid contributions have been upheld: although the agreement may be invalid, *Lewis v. Seanor Coal Co.*, 259 F.Supp. 256 (W.D.Pa. 1966), *aff'd* 382 F.2d 437 (3rd Cir. 1967), *cert. den.* 390 U.S. 947 (1968); where a prehire agreement has been entered into with a minority union, *Western Washington Cement Masons Trust v. Hillis Homes, Inc.*, 26 Wn.App. 244, *pet. reh. den.* #47200-9 (1980); and where the union did not claim to represent a majority of the employees, *Trust Fund Services v. Heyman*, 15 Wn.App. 452 (1976), *aff'd* 88 Wn.2d 698 (1977), *cert. den.* 434 U.S. 987 (1977). The message of these authorities is that §302 allows for the payment of contributions to jointly-trusteed funds as long as there is a written agreement in effect. Such interpretation furthers the underlying purpose of §302 to protect against misapplication of funds.

There is no supporting authority for the Court's requirement of a collective bargaining agreement as a prerequisite for the lawful payment of contributions. In *Moglia v. Geoghegan*, 267 F.Supp. 641 (S.D.N.Y. 1967), the District Court judge recognized that "the statute does not specify that the written agreement be a collective bargaining agreement." As this principal was affirmed on appeal, *Moglia* does not serve as authority for the Court's decision. *Moglia* merely stands for

the accepted proposition that contribution payments must *at least* be based upon a written agreement binding the party making payment and that the agreement may not be established solely on the basis of estoppel by conduct. *Doyle v. Shortman*, supra.

Neither does the case of *Dohrer v. Wakeman*, 14 Wn.App. 157, 539 P.2d 91 (1975) support the proposition that contribution payments may only be lawfully made under a collective bargaining agreement with an exclusive bargaining representative. The Court's discussion of §302 requirements makes no reference to this issue. *Dohrer* expresses the general rule that owner-operators are not "employees" for purposes of participation in jointly-trusteed funds and that their rights to benefits do not vest solely as a result of the previous self-payment of contributions. *Dohrer* has no relevance to the case at bar.

Neither does the Court find support in *Rockey v. Teamsters Pension Trust*, 23 Wn.App. 248, 595 P.2d 557 (1979). While this case correctly notes that contributions paid without the benefit of a written agreement are unlawful per §302, it does *not* limit the payment of contributions to collective bargaining agreements with "majority" unions. Indeed, *the Court adopted a liberal philosophy regarding the interpretation of rights under* §302 when it stated:

> "[W]e believe the courts must approach the question of employee pension eligibility with the philosophy expressed by Mr. Justice Blackmun, then a judge of the Eighth Circuit, when he said in *Blassie v. Kroger Co.*, 345 F.2d 58 (8th Cir. 1965):
>
> "We would prefer to approach our present task [requested civil relief under Section 302] with a construction policy favoring inclusion and benefits where there is not positive statutory language or inference of exclusion, rather than one favoring exclusion and a denial of benefits where there is no positive language of inclusion."

Reliance on *Suro v. Arroyo Lighterage & Shipping Co.*, 1 NBPX 203 (P.R. 1957) is also misplaced since the district court merely adopted a settlement stipulation of the parties as its findings and conclusions. No independent evaluation of §302 is contained in the opinion, and the facts concern whether there

was equal trustee representation on the fund which is a structural defect not alleged here. *Suro* does not say that §302 requires collective bargaining agreements with majority unions, and it has not been cited for that proposition.

The practical result of the Court's ruling is that union, employers, employees and trust funds may never be certain whether their adherence to the literal provisions of a written agreement will constitute criminal activity under §302. The ruling casts doubt upon the legality and enforceability of thousands of labor agreements in this state and frustrates the expectations of employees in retirement and other benefits. The ruling should be modified to provide for the lawful payment of contributions pursuant to written labor agreements notwithstanding the union majority questions.

B. *The "Representative" Requirement*

The Court's belief that contributions must be supported by a collective bargaining agreement with an exclusive bargaining representative as defined in Section 9 of the Act is also without support. Ths narrow definition of the word "representative" is not supported by previous judicial constructions of the statute. The word "representative" when considered within the context of §302 is read broadly and may include individuals, e.g. labor relations consultants, as well as institutions. This is explicitly recognized in *Shapiro v. Rosenbaum*, 171 F.Supp. 875 (S.D.N.Y. 1959), the sole case cited by the Court on this issue, which states:

> "The Act itself provides, in Section 501(3) (29 U.S.C.A. §142(3), that the term "representative" shall have the 'same meaning as when used in the National Labor Relations Act as amended by this Act.' The pertinent definition is contained in Section 2(4) of the National Labor Relations Act (29 U.S.C.A.§412(4): 'The term 'representatives' includes any individual or labor organization.'
>
> In *United States v. Ryan*, 1956, 305 U.S. 299, 76 S.Ct. 400, 403, 100 L.Ed. 335, the Supreme Court authoritatively held that *the* term "representative" in Section 302 was not limited to the "exclusive bargaining representatives" of employees but was broad enough to include a union

president who was also a member of a wage scale committee which represented the union in bargaining with the employer. The Court specifically stated (350 U.S. at page 302, 76 S.Ct. at page 403),

> "* * * that in using the term 'representative' Congress intended that it include any person authorized by the employees to act for them in dealings with their employers * * * (and) someone in the position of respondent Ryan who represented employees both as a union president and principal negotiator." (Emphasis added)

Since the union represented thousands of employees of association member employers it was a representative within the meaning of the Act. The Court's ruling that the term representative is limited to exclusive bargaining representatives designated or selected for the purposes of collective bargaining by the majority of the employees is simply unsupportable by relevant legal authority. As set forth below, a ruling that requires the trust funds to prove the majority status of the union as part of its prime facie case for recovery is contrary to established cases, statutes and federal policies.

C. *Considerations of Congressional Intent*

The narrow reading of §302 will preclude thousands of employees from obtaining the full benefits of their labor unless the union is shown to be their majority representative. This violates congressional intent. On September 26, 1980, the Multiemployer Pension Plan Amendments Act of 1980, Public Law 96-364, 94 Stat. 1208-1311 (1980) was signed into law. This legislation modified the Employee Retirement Income Security Act of 1974, 29 U.S.c. 1001 et seq. (hereinafter referred to as "ERISA"), to provide an express and unambiguous federal cause of action in favor of jointly trusteed funds against employers to recover delinquent fringe benefit contributions. Section 306 of this new legislation provides for a new Section 515 of ERISA which states in pertinent part:

"DELINQUENT CONTRIBUTIONS"

"SEC. 515. Every employer who is obligated to make contributions to a multiemployer plan under the terms of a collectively bargained agreement shall to the extent not inconsistent with the law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

•••

"(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce Section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan —

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of —

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under sub-paragraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For the purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954."

During Senate debate on the legislation, Senator Harrison A. Williams, a sponsor of the bill, explained the legislative purpose of section 306 with particular regard to the problems which "minority" union defenses create for multiemployer funds. In rejecting the defense of lack of union majority in trust claim for delinquent contributions, he stated:

"Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law — other than 29 U.S.C. §186. *Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.*

•••

The public policy of this legislation to foster the preservation of the private multiemployer plan system necessitates that provision be made to discourage delinquencies and simplify delinquency collection. The bill imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans. A plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the delinquent contributions, court costs, attorney's fees, interest on the contributions owed and liquidated damages. *The* intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies.[1] (Emphasis added)

This statement of purpose was repeated in House debates by Congressman Frank Thompson, Jr.[2]

The incongruous result of the ruling of this case is that before a fund may lawfully receive contribution payments from employers signatory to labor agreements they must verify the union's majority status or face the prospect of violation of the criminal proscriptions of §302. Trust Funds are not capable of independently determining whether a union is the representative of a majority of an employer's employees.

---

1. 126 Cong. Rec. S.11673 (daily ed., August 26, 1980)
2. 126 Cong. Rec. H. 7899 (daily Ed., August 26, 1980)

As a practical matter, multiemployer plans do not have the resources or the expertise to monitor constantly each employer and make judgements as to whether the union has achieved majority status. To engage in such monitoring would be a wanton waste of plan assets which would otherwise be used for the benefit of plans' participants and their beneficiaries. Yet, if the plan does not engage in such monitoring, it and its trustees will be running the risk of accepting contributions from an employer whose collectively bargained agreement is void and ineffectual for section 302 purposes.

The court's decision traps multiemployer plans and their trustees in a dilemma between the threat of criminal prosecution and expending inordinate amounts of the plan's assets to monitor the day-to-day activities of contributing employers and the unions which represent their employees. For the trustees, who are bound by the strict fiduciary responsibility requirements of the ERISA, 29 U.S.C. §1104-1113, including the requirements to administer the plan in accordance with law, this dilemma involves the additional threat of personal liability for breach of their fiduciary responsibilities. *See* 29 U.S.C. §1109.

This is not an isolated problem. It is an industry-wide problem which the Court's decision has created and it affects literally every multiemployer fund outside the building and construction industry. The defense of lack of majority has been rejected in the building and construction trades context as a result of the *Hillis Homes* decision, supra. If upheld, this decision and the threat of criminal and civil sanctions to which it gives rise, will greatly discourage the continued maintenance of multiemployer plans in the service and industrial trades, a result directly contrary to the policy of the Multiemployer Pension Plan Amendments Act of 1980. The survival of retirement rights should be protected, not threatened by our courts.

ARGUMENT

II. Gateway II Clearly Conflicts with the Leading Case of This Court Holding that Trust Funds are Immune From Defenses Relating to Contract Formation.

A. *Claims For Contributions Based On Work Performed are Insulated From Employer Defenses*

The foundation case concerning defenses to suits by joint labor-managment trustees to recover unpaid contributions, as third-party beneficiaries of collectively bargained agreements is *Lewis v. Benedict Coal Co.*, 361 U.S. 459, 45 LRRM 2719 (1960) which generally involved whether union breaches were defenses to collection suits by trustees and specifically involved whether an employer could offset a judgment he obtained against the union for damages sustained from alleged illegal strikes, against a judgment obtained by the trustees against the employer for unpaid fringe benefit contributions. Before concluding that,

> "[T] parties to a collective bargaining agreement must express their meaning in unequivocal words before they can be said to have agreed that the union's breaches of its promises should give rise to a defense against the duty assumed by an employer to contribute to a welfare fund meeting the requirement of Section 302(c)(5)..."

the Court observed that,

> "furthermore, Benedict promises in the collective bargaining agreement to pay a specified scale of wages to the employees. It would not be contended that Benedict might recoup its damages by decreasing these wages. This could be rationalized by saying that the covenant to pay wages is included in separate contracts of hire entered into with each employee. The royalty payments are really another form of compensation to the employees, and as such the obligation to pay royalty might be thought to be incorporated into the individual employment contracts. This is not to say that the same treatment should necessarily be accorded to royalty payments, as is accorded to wages, but the similarity militates against the inference that the parties intended that the trustees' claim be subject to offset."

In *Trust Funds Services v. Heyman*, supra., the Court correctly observed that *Benedict Coal* stood for,

---

3. 95 LRRM 3040, 3043

"... the principle that such contributions with respect to past labor are in the nature of compensation, the right to which accrues when the work is performed."[3]

Accord: *Lewis v. Seanor Coal*, supra.

The recent case of *NLRB v. Amax Coal Co.* 101 S.Ct. 2789 (1981) supports this principle of guaranteeing payment of benefits for work performed. The Court, citing Congressional history, stated that the sole purpose of §302(c)(5) is to ensure that the employees who are entitled to benefits actually receive them. Nothing in this case suggests that employee benefit obligations may be avoided because the union failed to generate majority support. The implication of the case is that when the employer makes a legitimate promise to pay benefits to a lawfully established trust fund, the employees are entitled to those payments for work performed.

B. *Minority Union Defenses Have Been Rejected*

In *Trust Fund Services v. Heyman*, supra., the contention was that the agreement the trustees were seeking to enforce was illegal because it violated §8(a)(1) and (b)(1)(A) of the Act in that the union did not represent a majority of the employees when the contract was made. In rejecting this defense the Court of Appeals declared,

> "There are three reasons why this contention must be rejected. The first reason is that the determination of an unfair labor practice under the National Labor Relations Act of 1947 - the illegality claimed here - is exclusively a function of the federal system." (Citing *Garmon*, supra.)

and that,

> "(T)he second reason is that Heyman's claim of an unfair labor practice was made too late."

and finally,

> "The third reason is that an unfair labor practice is not

available as a defense to an action by trustees for contributions based upon hours of labor already performed." (citing *Benedict Coal*, supra.)[4]

The Court of Appeals was affirmed 88 Wn.2d 698, 95 LRRM 3040 (Wash.Sup. Ct. 1977), *cert. den.* U.S. 987 (1977). Accord: *Sheriff v. Medel Electric Co.*, supra.; *Audit Services v. Elmo Road Corp.*, supra.; *Pipe Trades v. England*, 69 LRRM 2370 (Cal. Super. Ct. 1968); *Lewis v. Splashdam Do.*, 233 F.Supp. 47, 57 LRRM 2630 (W.D.Va. 1964).

ARGUMENT

III. The Court's Ruling Violates Federal Labor Policy Embodied in the Labor-Management Relations Act and the Employee Retirement Income Security Act

A. *The Court's Ruling Conflicts With National Labor Policy Embodied in The Labor Management Relations Act.*

While placing "collective bargaining contracts in a special class, exempt from some of the rules of construction traditionally applicable to contracts"[5] this Court, in *Benedict Coal Co.*, supra., extended the protection of national labor policy to suits by joint labor-management trustees seeking to preserve fringe benefit contributions on behalf of beneficiaries. In the words of the Court,

> "Although this policy exempting the assets of individual members from judgments against their unions was prompted by a solicitude for the union members, because they have little opportunity to prevent the union from committing actionable wrongs, it seems to us to apply with even greater force to protecting the interest of beneficiaries of the welfare fund, many of whom may be retired, or may be dependents, and therefore without any direct voice in

4. 93 LRRM 3081, 3083

5. *Lewis v. Mill Ridge Coal, Inc.*, 188 F.Supp. 4 (E.D.Ky. 1960) *aff'd* 298 F.2d 552 (6th Cir. 1962)

the conduct of union affairs. Thus the national labor policy becomes an important consideration in determining whether the same inferences which might be drawn as to other third-party agreements should be drawn here."

The national labor policy enunciated in Benedict was recently further elaborated in Circuit Judge Adams' concurring opinion in *Huge v. Longs' Hauling Co., Inc.*, supra:

"The wisdom of not permitting employers such as Long to interpose defenses to their undertaking to support union welfare and pension funds seems apparent. With both the number of Americans in retirement and the duration of those non-remunerated years of their lives increasing, and with the costs of health care soaring, it has become ever more important to provide for those situations where the costs of living will no longer be satisfied from anticipated income. Social Security benefits are often insufficient by themselves to meet those needs, and must be supplemented from other sources. For millions of unionized employees, the chosen and preferred method for insuring against the privations of sickness, unemployment, and old age has been the union welfare and pension funds. Under such arrangements, the employer contributes periodically to the funds an amount negotiated by contract. Such contributions are, in reality, indirect or deferred compensation, earned by the employee with each hour of each day worked. Ensuring the viabiity of these funds and protecting the employees' investment from dissipation as a result of union or employer conduct or misconduct has for many years been a concern of the federal government, and has recently received renewed attention.

As Benedict makes clear, insulation of the employer's obligations to union welfare and pension funds from defenses that the employer otherwise may assert to its agreement to perform under the labor contract serves vital public interests. It prevents penalizing employees for alleged union misdeeds over which they have little, if any, control. And it guarantees hard-working people the unemployment, health and retirement protections that they and their families expect to receive as part of the terms of their employment.

Moreover, such a rule forces an employer to disclose promptly any problems that may exist in its undertaking

to provide for its employees' health and retirement needs, rather than create false impressions in the minds of its employees regarding the compensation they are entitled to receive. It thus forecloses the possibility that an employer will surprise its employees by revealing at a late date that it was not legally bound to provide for contingencies that may afflict them or their families in the future. The employer may still have its claim adjudicated by bringing, in the proper forum, a timely suit against the union for rescission of the contract, anti-trust damages, or a declaration that an unfair labor practice has been committed, as the case may be. It would be discouraged, however, from biding its time in such a way as to jeopardize the future security of its employees.

Finally, it appears preferable as a matter of judicial administration to require that the employer sue the union directly if it believes it has reason to be excused from performing under the labor agreement, instead of permitting it to assert its claim by way of defense against the trustees. The employer dealt with the union and bases its case on those dealings. Clearly, the enforceability of the labor agreements can better be ascertained in the context of a lawsuit to which the principal actors are parties than in one where one party, the trustees, does not have first-hand knowledge of the material facts."[7]

B. *The Court's Ruling Conflicts With National Policy Embodied In the Employee Retirement Income Security Act*

Congress in its findings and declaration of policy for the Employee Retirement Income Security Act of 1974 stated that:

"The Congress finds that the growth in size, scope, and number of employee benefit plans in recent years has been rapid and substantial . . . that the continued well-being

7. 101 LRRM 2396, 2402

> and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate charactor of their participants, and the employers, employee organizations, and other entities by which they are established or maintained . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interest of employees and their beneficiaries, and to provide for the general welfare and free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation and administration of such plans . . . that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries . . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness." 29 U.S.C. §1001(a)

The financial security of employee benefit plans and the security of the employees who have an interest in such plans are ill served by a ruling which allows an employer to bind surreptitiously the trust funds to future obligations while it evades its own duties. "ERISA" sections 202 through 204, 29 U.S.C. Secs. 1052-1054, require that pension trust funds provide vesting and benefit accrual to all bargaining unit employees on an "hour of service" basis. An "hour of service" is defined by regulations:

> "An hour of service is each hour for which an employee is paid, or entitled to payment for the performance of duties for the employer during the applicable computation period."[8]

---

8. C.F.R. §2530.200 B-(2)(a)(1) (1979)

According to the Labor Department,

> "[C]redit must be given solely on the basis of service performed for a participating employer, regardless whether that employer is required to contribute for such service or has made or defaulted on his required contributions." [9]

As can be seen, a trust fund may be legally bound to provide credited hours of service to *all* of an employer's non-union employees. In the event these employees work sufficient hours to qualify for retirement benefits within work classifications included in a written labor agreement, they must be paid by the fund. It is unconscionable to require trust funds to meet their "ERISA" obligations to all employees without enforcing contribution payments from an employer.

A trust obligated to pay benefits, and prevented from compelling employer contributions, will increase its unfunded liability until it will not be able to meet future commitments. This effect has been noted in *Central States Pension Fund v. Hitchings Trucking*, 102 LRRM 2139 (E.D.Mich. 1979) where the court awarded judgment for unpaid contributions from an employer which made contribution payments beyond the contractual expiration date. Finding that the employer was estopped by its conduct from denying liability the court added:

> "Finally, the Employee Retirement Income Security Act of 1974 (ERISA) suggests an additional reason why the employer should be required to make the payments to the pension fund. ERISA was intended to stabilize the rights and liabilities involved in pensions established by collective bargaining."
>
> •••
>
> "Stability and protection requires assurance of adequate funding and the prevention of arbitrary termination rights. ERISA protects employees' rights to pension funds under pension trust of the employees qualify. 29 U.S.C. §§1052 and 1054. Whether payments to the trusts have or have

---

9. Labor Department Advisory Opinion Letter on Delinquent Contributions dated August 31, 1976, 19876, Opinion 76-89 221 BNA Pension Reporter R-24

not been made by the employer is not relevant in the determination as to whether or not an employee qualifies.

•••

"A ruling by this court in an action between the employer and the fund could not adversely affect the rights of the employees to make claims against the fund when they become due, regardless of whether this court would have ordered the employer to make payments. It is not unlikely that they might prevail on the same theory that is being asserted in this case by the plaintiff.

A *ruling adverse to the plaintiff in this court would place the plaintiff in an anomalous position: It would have no defense whatsoever to the claims being made by the employees.* As a result of this decision, it would be required to meet the *financial burden of ERISA's guarantees in the form of pension payments without corresponding contributions to the defendant's employees and similarly situated employees.* As the plan covers several hundred thousand participants, with over 1400 contributing employers, the actuarial soundness of the fund would be compromised. (at LRRM 2141) (Citations omitted and emphasis added.)

Pension funds, financed by employer contributions, will be severely jeopardized if their "ERISA" obligations are not supported by contribution payments. The Court's decision that the trust funds have no right to accrued contributions is clearly contrary to the "ERISA" policy of preserving the solvency of employee benefit plans and securing the interests of employees and their beneficiaries in such plans. The decision allows employers to disavow their pension promises after long periods of partial or even full contractual compliance. During this period employee rights may vest and trust obligations accrue. Pension funds obligated to finance these obligations, but prevented from funding them by enforcing employer promises, will perish.

SUMMARY OF ARGUMENT

1. The decision that contributions are only lawful if paid pursuant to a collective bargaining agreement between an employer and a union which is the exclusive bargaining

representative of the employees is contrary to existing legal precedents, subjects fund managers to insurmountable administrative burdens related to the determination of a union's majority status, and controvenes the intent of Congress as expressed in recent amendments to the Employee Retirement Income Security Act of 1974 (ERISA).

2. In actions by a trust fund for unpaid employer contributions, courts should disallow defenses that an employer might assert against the union if the union were seeking to enforce the collective bargaining agreement. Allowing such defenses undermines many court decisions which have held otherwise and contradicts the national pension policy enunciated through enactment of ERISA.

CONCLUSION

The trust funds urge this Court to grant the Petition for Certiorari.

Respectfully Submitted,

Richard P. Donaldson
Duane D. Kiel
DONALDSON & KIEL, P.S.
Counsel For Amici Curiae